

Emery Worldwide, a Division of Consolidated Freight Corp. and Earl Bragunier. Case 6-CA-22284

February 14, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On August 30, 1991, Administrative Law Judge Leonard M. Wagman issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs¹ and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ We find it unnecessary to pass on the General Counsel's motion to strike portions of the Respondent's answering brief because the judge, whose dismissal of the complaint we are adopting here, did not rely on similar arguments that the Respondent had raised to him in its posthearing brief.

² The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge in his decision referred to the Respondent's terminal manager as both David Londino and David Landino. The record shows that this management official's correct last name is Londino, and we correct the judge's decision accordingly.

Robin F. Wiegand, Esq., for the General Counsel.
Richard J. Antonelli, Esq. (Buchanan Ingersoll, P.C.), of Pittsburgh, Pennsylvania, for the Respondent.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried at Pittsburgh, Pennsylvania, on May 14 and 15, and November 6 and 7, 1990. On a charge filed on November 30, 1989,¹ by Earl Bragunier (the Charging Party or Bragunier) a first amended charge filed by Bragunier, on January 19, 1990, and a second amended charge filed on May 14, 1990, the Regional Director for Region 6 issued a complaint on January 19, 1990, which he amended at the hearing before me.

¹ Henceforth, all dates are in 1989, unless otherwise indicated.

The complaint, as amended, alleged that the Respondent, Emery Worldwide, a Division of Consolidated Freight Corp. (Emery), violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by issuing a written warning to Bragunier on May 31, suspending him on June 1, and by terminating him on June 2, all because of his union and other concerted activity protected by the Act. In its answer, as amended at the hearing, Emery denied that it had committed any of the alleged unfair labor practices. Following the close of the hearing, the General Counsel and Emery timely filed briefs.²

On the entire record, including my opportunity directly to observe the witnesses and their demeanor, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

Emery is a corporation with facilities at Pittsburgh, Pennsylvania, where it has been engaged in the business of express delivery of freight and mail service. During the 12-month period ending October 31, Emery, in the course and conduct of its business operations, realized gross revenues exceeding \$50,000 from the transportation of freight and mail from Pennsylvania directly to points outside of Pennsylvania. Emery admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7).

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

In May 1987, Emery Air Freight Corporation purchased Purolator Courier. Approximately 2 years later, Consolidated Freight Ways, Incorporated purchased Emery Air Freight and Purolator Courier. Resulting from this transaction, effective April 17, was the Respondent, Emery.

From 1972, until June 2, Emery and its predecessors employed Bragunier as a courier delivery driver at their Pittsburgh facility, known as the Ross Township terminal. At no time during this employment were Bragunier or his colleagues at the Ross Township terminal represented by a union. Bragunier's assignment was to drive a truck daily, on a designated route, delivering and picking up packages. His cargo ranged from overnight envelopes to 5000- or 10,000-pound shipments. For the 1-year period preceding his termination on June 2, Emery assigned Bragunier to drive Route 243. The farthest point on this route was 50 miles from the terminal. Route 243 extended from Monroeville, Pennsylvania, to New Alexandria, Pennsylvania.

Emery's records include a verbal written warning dated November 29, 1988, in which Service Supervisor Thomas Graham complained that Bragunier was spending too much time at the terminal. Bragunier testified that he did not receive this warning. However, on cross-examination, Bragunier remembered a conversation with Graham regarding excessive loading time.

During the latter part of 1988 and extending into the early part of April 1989, Bragunier and his fellow employees discussed their concerns about wages, health benefits, holidays,

² The General Counsel's motion to correct the transcript is noted and corrected.

and summer vacation benefits. Bragunier suggested that the employees put their concerns in writing, hold a meeting with the terminal's management, and try to obtain some adjustments. Among the employees with whom Bragunier carried on such discussions was courier driver Peter Stackhouse.³

On April 3 and 4, Service Supervisor Douglas Hughes audited Bragunier's job performance, and established a route standard of 5.18 stops per hour for Route 243. Hughes, who was Bragunier's immediate supervisor, followed Emery's normal procedure for establishing delivery performance requirements. This procedure required Supervisor Hughes to accompany Bragunier on his route.

On or about April 7, Service Supervisor Douglas Hughes counseled Bragunier on his work performance. Hughes also issued a memorandum to Bragunier entitled "Route Requirements." This memorandum outlined Hughes' expectations regarding Bragunier's daily work performance and included the statement that: "Route 243 standard is 5.18 stops per hour. There should be no reason why this cannot be met on a consistent basis."

On April 17, Emery's Ross Township terminal management held a meeting attended by Bragunier and as many as 50 other terminal employees. The new terminal manager, David Londino, was introduced to the employees for the first time. He discussed the recent merger between Emery and Consolidated. As Londino spoke, one of the courier drivers suggested to Bragunier that he, Bragunier, should approach Londino about the drivers' concerns and problems. Other drivers echoed that suggestion.

After the meeting had concluded, Bragunier approached Londino and asked if a meeting could be arranged between the two to discuss the courier drivers' concerns and problems. Bragunier mentioned wages, vacation schedules, long hours, and layover time. Londino said he needed time to get acquainted, and that after he had checked the terminal out, he would get back to Bragunier.

Toward the end of April, Bragunier asked Londino if he had explored the drivers' complaints. Londino asked Bragunier to recite them again. Following a discussion, Bragunier asked about a meeting. Londino was receptive. Bragunier mentioned putting the drivers' concerns in writing for Londino's perusal. Londino said he would get back to Bragunier.

In early May, Bragunier had conversations with six of his courier driver colleagues about Londino's attitude toward a meeting about wage increases and other problems, and about having a meeting at which the drivers might put their concerns in writing. During the second week of May, when it appeared that the drivers could not get together, Bragunier and driver Peter Stackhouse met during their layover time at a parking lot. They drafted a list of questions and complaints

regarding wages, benefits, vacations, sick days, and working conditions. Bragunier agreed to take the handwritten list home to be typed by his wife for submission to Londino.

I find from Bragunier's uncontradicted testimony, that the subject of prounion sentiment also surfaced in the first half of May, during a conversation between him and Operations Manager Robert Kaczorowski. Bragunier complained that his immediate supervisor, Service Supervisor Douglas Hughes, was harassing him and other drivers. After suggesting that corrective action be taken, Bragunier reported that some of the drivers were talking about getting a union. Kaczorowski instructed Bragunier to keep him informed if he heard anything more about a union.

Bragunier vacationed from May 15 until May 19. Before leaving, Bragunier met Terminal Manager Londino at work, and attempted to set up a meeting to discuss the drivers' questions and complaints. Londino suggested the following week, which would have conflicted with Bragunier's vacation.

From April 20 until May 31, Hughes monitored Bragunier's stops per hour on Route 243. Hughes had also noted that Bragunier's overtime hours and time spent in the terminal were excessive. Hughes's chart showed that Bragunier failed to meet the 5.18 standard on 16 of the 19 days on which he drove Route 243.

Bragunier returned to work on May 22. That same day, Supervisor Hughes handed a written warning to Bragunier. In the warning, Hughes noted three areas of deficiency in Bragunier's work for the period from April 20 through May 12. Hughes' critique discussed insufficient stops per hour, excessive morning terminal time, and excessive outbound stem time. This last figure reflected the time Bragunier took to drive from the terminal to the first stop on his route. Bragunier refused to sign the warning, which spoke of a final written warning, if Bragunier failed to correct any of the three deficiencies.

Following his return to work from vacation, Bragunier arranged a meeting with Londino, to take place on May 31, in the latter's office, at the Ross Township facility. On May 30, Bragunier, with the assistance of his wife and son, prepared the final list of the drivers' questions and complaints for presentation to Londino.

On May 31, Bragunier and Londino met as planned. Bragunier presented the typed list of questions and complaints, and explained the document. The two discussed its contents. Londino agreed to study the list and Bragunier left the manager's office. As Bragunier neared the dispatch office, Hughes handed him a final written warning. The warning, which Hughes had prepared on May 30, stated that on May 25 and 26, Bragunier had failed to meet the route standard of 5.18 stops per hour, and that failure to comply with that standard "could result in further disciplinary action, including suspension and/or termination."

Bragunier's reaction to the final written warning was to return at once to Londino's office. When he arrived, Bragunier found the terminal manager and Operations Manager Kaczorowski conferring, and noticed his list of questions and complaints sitting on top of Londino's desk. Bragunier showed the warning to Londino and complained that this was an example of the harassment suffered by the drivers. Londino handed the paper to Kaczorowski, who said he would talk to Hughes about it.

³ My findings regarding Bragunier's participation in discussions regarding wages, hours, and conditions of employment, and his role in the preparation and presentation of a list of employee questions and concerns regarding these topics, are based on his and employee Peter Stackhouse's credible testimony. After insisting that the idea of compiling a written list of employee questions and concerns had originated with his colleagues, Bragunier conceded under the pressure of extensive cross-examination that it was his idea. Bragunier's remaining testimony regarding the list, which he presented in a frank manner, was largely corroborated by Stackhouse, who impressed me as being a disinterested observer reporting his full recollection.

On May 31, Hughes and Kaczorowski discussed the final warning which Bragunier had received that same day. They decided to monitor his performance that day and on June 1. Bragunier's performance was below standard. After Bragunier had completed his workday, on June 1, Hughes and Kaczorowski met with him. Kaczorowski asked Bragunier to explain his failure to meet the route standard or otherwise improve his productivity. Bragunier answered that he thought "it was mainly a problem between supervisor and employee, meaning Doug Hughes and [himself]." On completion of the discussion, Kaczorowski announced Bragunier's immediate suspension from Emery's employ. Kaczorowski and Hughes also decided to recommend Bragunier's termination.⁴

On the morning of Friday, June 2, Kaczorowski and Hughes went to Terminal Manager Londino's office, and recommended Bragunier's termination. On hearing Bragunier's name, Londino asked who he was. Kaczorowski and Hughes provided enough description to allow Londino to connect Bragunier to both the list of complaints and questions and the recommended termination. This conversation was also the first that Kaczorowski and Hughes had heard of the list and Bragunier's role in its presentation to the terminal manager.

Before taking the final step in the termination, Londino consulted John Raymond, Emery's manager of employee relations for its central area. Londino assured Raymond that Kaczorowski had first learned of the list after deciding to recommend Bragunier's termination. Londino also asserted that the list had not influenced his decision to accept the rec-

ommendation. Raymond advised Londino to go forward with the termination.

On the afternoon of June 2, Kaczorowski telephoned Bragunier and terminated him. Bragunier appealed his termination to a division manager. By letter dated July 10, Emery's Cleveland division manager, John E. Leonard, denied Bragunier's written appeal. Emery has not offered to reinstate Bragunier.

B. Analysis and Conclusions

The General Counsel contends that Emery issued a written warning to Bragunier on May 31, suspended him on June 1, and discharged him on June 2, "in retaliation for his protected concerted activities and/or because he raised the specter of unionization among the drivers at [Emery's] facility." Emery urges rejection on the ground that the record does not show that Bragunier's role in the compilation of the list of drivers' questions and concerns, his presentation of that list to management, or any other activity protected by Section 7 of the Act⁵ played any role in the decisions to discipline him on May 31, suspend him on June 1, and then terminate him on June 2. I find that the General Counsel has failed to establish the alleged violations.

Under Board policy, where the record shows that an employer's hostility toward activity protected by Section 7 of the Act was a motivating factor in a decision to take adverse action against an employee, the adverse action will be found to be unlawful unless the company is able to demonstrate, as an affirmative defense, that it would have taken the adverse action even in the absence of the protected activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 402-403 (1983), affg. *Wright Line*, 251 NLRB 1083 (1980), enf'd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Where it is shown that the business reasons advanced by the employer for its actions were a pretext—that is, that the reasons either do not exist or were not in fact relied on—it necessarily follows that the employer has not met its burden and the inquiry is logically at an end. *Wright Line*, 251 NLRB at 1084.

One of the elements required to show Emery's alleged unlawful motive in issuing a written warning to him on May 31, suspending him on June 1, and terminating him on June 2, is knowledge of Bragunier's union activity or other activity protected by Section 7 of the Act. At the outset, I find that Bragunier was not engaged in any union activity, at any time material to the alleged violations in this case. Nor was there any showing that Hughes, Kaczorowski, or Londino suspected that he was engaged in union activity. Instead, the record shows only that Bragunier remarked to Kaczorowski that he, Bragunier, had heard some union talk among the employees. Kaczorowski asked to be advised if Bragunier heard any more expressions of pronoun sentiment. The record con-

⁴ Bragunier testified that he handed the list of drivers' questions and complaints to Londino on May 31, that he met with Hughes and Kaczorowski on June 1, and that he was suspended on the latter date. According to the testimony of Landino, Kaczorowski, and Hughes, Bragunier did not present the list until June 1, and Bragunier's meeting with Hughes and Kaczorowski did not occur until June 2. Granted that Bragunier's testimony contained instances of evasiveness, and that there were inconsistencies between his testimony and his affidavit, which he gave to a Board agent, I have credited his testimony regarding these disputed dates. For, when testifying about the list and incidents leading up to his termination, Bragunier did so with conviction, as if he were reliving these events.

In contrast, I noted Landino's uncertainty and counsel's resort to leading questions in attempting to support Emery's proffered timetable. At first, Londino testified that his meeting with Bragunier could have occurred on May 31. Later, in answer to leading questions by Emery's counsel, he agreed that it occurred on June 1. I also noted that Emery's counsel used leading questions to his witnesses Londino, Hughes, and Kaczorowski to inject June 2 into the record as the date for Bragunier's suspension, his meeting with Hughes and Kaczorowski, and his termination.

Other factors suggested that Bragunier's testimony regarding events on May 31, June 1 and 2, was reliable. I find from Bragunier's testimony, and a letter to him from Kaczorowski, that June 1 was Bragunier's last workday at Emery, a fact which strongly suggests that he had been suspended at the end of his shift, on that same day. Londino, Kaczorowski, and Hughes testified, in agreement, that Bragunier did not work any day after Emery had told him he was suspended. Another factor weighing in favor of Bragunier's timetable, was the absence of evidence showing an effort to contact him and invite him back to the Ross Township facility for a meeting on June 2 with management. Having credited Bragunier's testimony in this regard, I have also rejected Londino's testimony on cross-examination in which he agreed that he showed Bragunier's list to Kaczorowski prior to the announcement of Bragunier's suspension.

⁵ Sec. 7 provides in pertinent part:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8(a)(1) of the Act provides:

It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7

tains no evidence of any incipient union activity among Bragunier's colleagues.

Further, there has been no showing that Hughes or Kaczorowski had any inkling of either Bragunier's participation in discussions with his colleagues regarding Emery's policies regarding wages, health benefits, holidays, or other conditions of employment or of his role in the preparation and presentation of the list of questions and concerns to Londino prior to June 2. That the list was on Londino's desk on May 31, when Kaczorowski was in his office was not sufficient proof that they discussed it, or that Kaczorowski knew about it at that time. Nor was the testimony that Londino and Kaczorowski had a longstanding working relationship sufficient to support a finding that they discussed the list on May 31 or June 1.

Instead, I find from Hughes' testimony that he knew nothing about the list at the time he issued the final warning to Bragunier. I also find from Hughes' and Kaczorowski's testimonies that they knew nothing about the list when they suspended Bragunier and when they decided to recommend his termination.⁶ In sum, the record does not permit me to find that Bragunier's Section 7 activity played any part in Emery's decision to issue a final warning to him on May 31, and to suspend him on June 1. Nor do I find that Section 7 considerations entered into Hughes' and Kaczorowski's thinking, when they decided on June 1 to recommend Bragunier's termination.

At the time he considered Hughes and Kaczorowski's recommendation, Londino knew of Bragunier's connection with the list of questions and concerns. However, in determining whether this knowledge was a motivating factor in Londino's decision to follow the recommendation, I must consider the evidence showing his sentiment toward Bragunier's Section 7 activity.

The record shows that Londino received the list from Bragunier on May 31 without apparent hostility. Indeed, Bragunier's testimony shows they discussed its contents calmly, and that Londino said he would study it and get back to Bragunier. There was no showing that Londino made any threat, direct or implied, to punish Bragunier for his role in the formulation and presentation of the list. Nor was there any showing that Bragunier's overtures for a meeting to discuss employee concerns had provoked Londino, or even annoyed him. On June 2, when he learned that Hughes and Kaczorowski were recommending the termination of the same employee who had presented the list of employee ques-

tions and concerns, Londino did not show that he was glad to get rid of Bragunier. Thus, I find that the General Counsel has failed to show that Londino was hostile toward Bragunier's Section 7 activity, prior to approving the recommendation to terminate him.

Nor am I persuaded that Bragunier suffered disparate treatment at Emery's hands. The record shows that employee Giles received a written warning from Supervisor Hughes, dated June 1, 1988, for failing to meet the standard for his route. Two days later, Hughes issued a final written warning to Giles and suspended him for the same offense. Thereafter, Emery terminated Giles for failing to comply with his route standard. In 1987, a second employee, Milton Hatch had performance problems in servicing his route. Emery gave him written warnings and finally laid him off indefinitely.

I find no merit in counsel for the General Counsel's argument that as his performance was not as far below standard as Giles' was, Bragunier did not deserve termination. However, there was no showing that Emery has ever tailored its punishment with the refinement counsel seeks for Bragunier.

In sum, I cannot find that the General Counsel has shown that Bragunier's Section 7 activity was a motivating factor in either Emery's decisions to discipline him by issuing a written warning to him on May 31, and by suspending him on June 1, or in its decision to terminate him on June 2. Accordingly, I find that the General Counsel has not shown by a preponderance of the evidence that Emery violated the Act when it disciplined and then terminated Bragunier, as alleged. I shall, therefore, recommend dismissal of the complaint.

CONCLUSIONS OF LAW

1. Emery Worldwide, a Division of Consolidated Freight Corp. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Emery Worldwide, a Division of Consolidated Freight Corp. has not committed any of the unfair labor practices alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

The complaint is dismissed.

⁶Both Hughes and Kaczorowski seemed to be frank witnesses when testifying about their knowledge of Bragunier's Sec. 7 activity.

⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.